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**DECISION**



*Refused*  
*Per*

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

FILE: B-189829

DATE: November 23, 1977

MATTER OF: Joseph La Spiva - Claim for Backpay

**DIGEST:** Employee of Department of Army claims backpay because he performed duties of higher grade positions. He claims that forms requesting his promotion were purposefully misplaced by the personnel office. Employee does not provide evidence sufficient to show an unjustified or unwarranted personnel action so as to be eligible for backpay under 5 U.S.C. 5596. General rule is that an employee is entitled only to the salary of the position to which he is appointed regardless of the duties performed.

This is in response to a communication from Mr. Joseph La Spiva, received on March 8, 1977, which constitutes an appeal to our Claims Division's settlement of February 28, 1977, (Settlement No. Z-2723556). By that settlement, our Claims Division denied Mr. La Spiva's claim for backpay.

Mr. La Spiva, an employee of the Department of the Army at the United States Armament Command, Rock Island, Illinois, claims that a Standard Form 52 requesting his promotion from GS-9 to GS-11 was placed in his file, was forwarded to the personnel office at the Rock Island Arsenal, but was never acted upon. In his letter of November 2, 1976, Mr. La Spiva claimed that this request and other requests for his promotion to GS-12 and GS-13 positions were purposefully misplaced. He states that he performed the duties of GS-11, GS-12 and GS-13 positions and is therefore entitled to \$108,462 in backpay.

Administrative report states Mr. La Spiva's claim is not supported by the evidence nor does his claim provide a specific time-frame for his alleged misassignments. Denial of the claim is recommended. Since the claimant states as of November 2, 1976, the date of his original claim, that the alleged action occurred 6 years before, the statute of limitations may bar his claim.

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Backpay is awarded under the authority of 5 U.S.C. 5596. That statute provides a remedy for wrongful reductions in grade, removals and suspensions, and other unjustified or unwarranted actions affecting pay or allowances. By its express terms it provides a remedy only when it has otherwise been determined that the employee has suffered a reduction in pay as the result of an unjustified or unwarranted personnel action.

The Civil Service Commission regulations implementing the Back Pay Act are published at 5 C.F.R. Part 550, subpart H and, as amended March 25, 1977, at Volume 42, page 16125 of the Federal Register, provide:

550.803 Determining entitlement.

"(a) An unjustified or unwarranted personnel action can only be corrected under the provisions of section 5596 of title 5, United States Code, if it is found by appropriate authority that the withdrawal, reduction, or denial of all or part of the pay, allowance, or differential due an employee was the clear and direct result of, and would not have occurred, but for the unjustified or unwarranted personnel action.

"(b) The requirement for an administrative determination in section 5596 of title 5, United States Code, is met when appropriate authority, as defined in paragraph (d) of this section, finds that an agency has taken a personnel action it was prohibited from taking, has taken a personnel action not authorized by law or regulation, or has not taken a personnel action it was required to take. Such determination shall always be in writing.

"(c) The requirement for a 'timely appeal' referred to in section 5596 of title 5, United States Code, is met when an employee or personal representative initiates a claim to the Comptroller General for settlement of his or her claim against the Government, or an appeal or grievance under an appeal or grievance system including appeal procedures

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included in a collective bargaining agreement, and that claim is accepted as timely filed by the Comptroller General, or that appeal or grievance is accepted as timely filed by the Government authority administering the appeal or grievance system, or is found to be timely filed by an appropriate authority, e.g., an arbitrator, the Assistant Secretary of Labor for Labor Management Relations or a court having jurisdiction.

"(d) the 'appropriate authority' referred to in section 5596 of title 5, United States Code, is (1) a court having jurisdiction; (2) the Comptroller General; (3) the Civil Service Commission; (4) an administrative authority designated in Executive Order 11491, as amended, or Executive Order 11636 (including a duly constituted grievance board); (5) the head of the employing agency or an agency official to whom corrective action authority is delegated; or (6) an arbitrator in binding arbitration cases.

"(e) A personnel action, to be unjustified or unwarranted must be determined by an appropriate authority to be improper or erroneous on the basis of either substantive merit or procedural defects.

"(f) The requirement for 'correction of the personnel action' in section 5596 of title 5, United States Code, is met when appropriate authority, consistent with law, Executive order regulation, or collective bargaining agreement, after a review, makes or directs the correction of an unjustified or unwarranted personnel action."

It is not possible to determine on the evidence before us whether there has been an unjustified or unwarranted personnel action.

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The regulations which prescribe the procedures for submitting claims to the General Accounting Office are found in Part 31, subchapter C, chapter 1, volume IV of the Code of Federal Regulations. Paragraph 31.7 of those provisions provides as follows:

"Claims are settled on the basis of the facts as established by the Government agency concerned and by evidence submitted by the claimant. Settlements are founded on a determination of the legal liability of the United States under the factual situation involved as established by the written record. The burden is on claimants to establish the liability of the United States and the claimants' right to payment. The settlement of claims is based upon the written record only."

The general rule is that an employee is entitled only to the salary of the position to which he is appointed, regardless of the duties performed. 55 Comp. Gen. 515 (1973).

Accordingly, the disallowance of Mr. Ia Spiva's claim is sustained.

*R. F. K. 1111*  
Deputy Comptroller General  
of the United States

NOV 28 1977

Director, Claims Division

Deputy  
Comptroller General R.F. KELLEY

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Returned herewith is file Z-2723556 along with a copy of our decision B-189829, dated today, sustaining your settlement of February 28, 1977.

Attachments

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